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Issue Date: 16 December 2003

OALJ CASE NO.: 2002-AIR-00008

In the Matter of:

Frank Brune,

Complainant,

vs.

Horizon Air Industries, Inc.

Respondent.

Appearances:

Frank Brune,

Pro Se

Tim Benedict, Esq.,
Hills, Clark, Martin & Peterson Law Offices,

For Respondent,

Before:

William Dorsey
Administrative Law Judge

DECISION AND ORDER GRANTING RELIEF

I. Background

Captain Frank Brune ("Complainant" or "Captain Brune") filed a claim under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 114 Stat. 145 (April 5, 2000), *codified as* 49 U.S.C.A. § 42121 (2003) (AIR 21 or the Act) against Horizon Air Industries, Inc. (Horizon or Respondent).

The core of Captain Brune's claim is that Horizon discriminated against him by placing derogatory memoranda in his personnel file[1] in August 2000 and again in May 2001, after he engaged in protected activities. The air carrier's Chief Pilot criticized him in the August 2000 memo for performing an *ad hoc* test of an aircraft's takeoff warning horn that appeared to malfunction during a preflight check. He threatened discipline if Captain Brune strayed from the prescribed pre-takeoff checklist again. In May 2001 one of Horizon's five Assistant Chief Pilots instructed him to write up a defective placard in an aircraft's maintenance log so it could be fixed. Captain Brune says he hesitated to make the entry because the Chief Pilot had told him in an earlier letter that placards are not items pilots inspect, writing them up violated Horizon's standardized preflight inspection procedures, and he subjected himself to serious discipline if he continued to write them up. The May 2001 memo also asserted that Captain Brune had made frivolous and illogical repair requests in the past, and repeated the Chief Pilot's earlier warnings. At trial Captain Brune testified about other incidents of harassment, but they do not serve as independent bases for relief, because he did not file complaints about them within the 90 day period the Act sets. He believes the earlier incidents and the two disparaging memoranda show a continuing pattern of discrimination that created such a hostile work environment that he developed hypertension. His AIR 21 claim is timely, he says, because Horizon committed a violation on May 7, 2001, when it attempted to constrain the discretion and responsibilities Federal Aviation Administration (FAA) regulations assign him as a pilot, and initiated a new complaint period. Characterized in another way, he believes Horizon is guilty of a continuing violation of the Act that he made a timely complaint about on May 22, 2001.

Horizon first responds that the Act simply does not reach incidents that occurred before its effective date of April 5, 2000. Second, Captain Brune did not file complaints within the requisite 90-day period after he received the written admonitions for his placard write ups and the takeoff warning horn incident. Third, if Captain Brune's claims pertaining to instruction he received about placards in August 1999 and the way he handled the takeoff warning horn incident in September 2000 are timely, Horizon's actions were consistent with FAA regulations. It sent the memoranda to stop him from impermissibly inventing his own preflight procedures. Horizon also implies that Captain Brune raised the safety issues as a ruse to impede timely airline operations.

After Horizon's motion for summary decision and motion in limine were denied on November 5, 2002, this case was heard on November 12, 2002 and November 13, 2002 in Portland, Oregon. Most of Captain Brune's Exhibits ("CX") 1-59[2] and all of Respondent's

[1] Horizon's criticisms may impede his ability to change employers, and jeopardize his opportunities for advancement as a pilot. The file is available to prospective employers under the Pilot Record Improvement Act (PRIA), 49 U.S.C.A. § 44703(h) – (j) (2003). That act originally had been codified as 49 U.S.C. § 44936 (f) – (h) (1997 & Supp. 2000); it was transferred to the end of 49 U.S.C.A. § 44703, redesignated as subsections (h) to (j) and amended by Pub. L. 107-71, Sections 138(b) and 140(a).

[2] At trial, Horizon raised a number of objections – mostly based on hearsay – to many of Captain Brune's exhibits. I overruled most of them, but sustained objections to: (1) quotations attributed to Greg Sime in CX 22 as hearsay, (2) CX 27 and CX 28 as hearsay, (3) notes in CX 51 about a conversation that took place between others over a company radio frequency; however, a company maintenance log in that exhibit is admissible, and (4) a medical opinion in CX 55 that is hearsay.

Exhibits ("RX") 1-13 were admitted into evidence. Although at one time he was represented by counsel, Captain Brune waived representation and appeared *pro se* at trial. TR at 7. Horizon and Captain Brune filed post-trial briefs and proposed orders.

For the reasons set out I have concluded that Captain Brune's complaint is timely; that Horizon's responses to his protected activities were adverse employment actions; that Horizon failed to prove legitimate non-discriminatory motives for what it did; that its voluntary removal of the threatening letters and memos from his personnel file does not foreclose the Secretary from imposing a remedy under the Act; and that Captain Brune is entitled to an order that requires Horizon to abate its violations, and to recover attorney's fees and costs he incurred in prosecuting this case, but not to recover compensatory damages, because he failed to prove that Horizon is responsible for his hypertension.

II. Issues for Adjudication

The issues are:

1. Whether incidents that occurred before the Act was passed may be grounds for a claim;

2. Whether the AIR 21 complaint was filed timely;

3. Whether Captain Brune engaged in activities protected under the Act;

4. Whether Horizon took adverse employment actions against him, and whether protected activities contributed to those adverse actions;

5. Whether Horizon demonstrated by clear and convincing evidence that it would have taken the same actions in the absence of protected activities;

6. If Horizon presented clear and convincing evidence of a legitimate, non-discriminatory motive for its adverse employment actions, whether Captain Brune established by a preponderance of the evidence that Horizon's justifications were pretexts for discrimination; and

7. Whether Captain Brune is entitled to relief, and if so, what relief.

III. Findings of Fact

Captain Frank Brune has flown for Horizon since 1991. As a pilot in command (or captain) since approximately 1996, he has had final authority and responsibility for the operation and safety of his flights. 14 C.F.R. § 1.1[3] (definitions). He primarily flies a commuter aircraft known as the deHavilland Dash-8, a twin engine, turbo-prop aircraft with 37 passenger seats and a three member crew consisting of a Captain, First Officer and Flight Attendant. His personnel file contained no derogatory material or record of discipline before 1999.

[3] The definitions appear alphabetically, but each defined term is not numbered separately.

Horizon provides commercial air service in several western states and Canada. Both Captain Brune and Horizon are subject to regulations of the Federal Aviation Administration on air safety, and are covered by AIR 21. Operations at Horizon are governed by the Part 121 regulations of the FAA, among others. TR 144.

Until the middle of 1999, Captain Brune's career at Horizon had been uneventful. With the filing of a Flight Operations Irregularity Report (HA-148) on July 6, 1999, he declined to pilot a flight when doing so would have violated Federal Aviation Regulation ("FAR")[4] 121.471(d), limiting the hours crew members may fly. CX 33. Although he was paid an annual salary rather than an hourly wage, Horizon reduced his pay for July 10, 1999 for not accepting the flight. CX 36. He declined another flight for the same reason, with a similar result, in September 1999. CX 38, 39. At the time there was an industry-wide dispute between professional pilots and air carriers about flight hours. The Administrator of the FAA ultimately interpreted the flight crew rest rule as Captain Brune and the pilots had. TR 269. He recovered the deductions from his salary in an action filed in a Washington small claims court. CX 42. After his resistance to Horizon's interpretation of the hours of flight regulation, management regarded him as someone who was not a team player, and treated him accordingly.

On July 30, 1999, after a preflight inspection by the First Officer, Captain Brune recorded in the aircraft maintenance log book a missing or damaged exterior placard on a Dash-8 aircraft he commanded on a flight originating in Walla Walla, Washington. CX 17. A placard is a decal sign that gives passengers, fuelers, maintenance personnel and others information, instructions or warnings. TR at 256-257. Aircraft must display specified markings and placards conspicuously, placed so they will not be erased, disfigured or obscured easily. FAR 25.1541. To be considered airworthy, aircraft in passenger service must have all required equipment. FAR 121.153(a)(2).

According to Horizon, flight crews are not to inspect external placards in their preflight inspection; that is a responsibility of the maintenance department. TR 92-93. Don Wiens, Manager of Flight Standards at Horizon, developed the Flight Standards Manual for Horizon's Dash-8 aircraft. He testified that a pilot's preflight inspection is limited to only those items enumerated in the Flight Standards Manual. Other items are to be inspected by the maintenance department or by other individuals. TR at 183. If there is an overlap, the Manual does not provide specific guidance, and pilots and maintenance personnel must consult about what to do. TR 184. Mr. Wiens implied that if a pilot inspected items that were not included in the Flight Standards Manual (whether those items determine airworthiness or not), he was deviating from the Manual and impermissibly creating his own procedures.

Passenger aircraft should have the placards the FAA included as equipment on the aircraft's type certificate data sheet. TR 190; FAR 25.1541. While a missing or damaged placard may not be such a serious defect that the aircraft must be withdrawn from service, a pilot is obligated to note deficiencies discovered during preflight inspection in the aircraft

[4] The Federal Aviation Regulations governing commercial air carriers primarily are found in Part 121 of Title 14 of the Code of Federal Regulations. In the industry and exhibits they are generally referred to as "FAR ____" ; those non-Bluebook designations will be used here.

maintenance log book, so they will be corrected. TR 119, 124; FARs 121.153 & 121.563. FAR 121.563 requires pilots to log mechanical irregularities "occurring during flight time," but Horizon tells its pilots in its FAA-approved Flight Safety Operations Manual to log all discrepancies that come to their attention, not just those seen during flight. Manual at page 4-10, TR 147. This is consistent with the obligation FAR 121.153 imposes on air carriers to operate passenger flights with all required equipment. (*Compare*, TR 145, implying that FAR 121.563 is inapplicable to deficiencies a pilot discovers on preflight inspections that necessarily are performed on the ground, *with* Asst. Chief Pilot McKinsey's contrary testimony at TR 124).

I cannot accept Horizon's view that placard deficiencies are none of a pilot's business. TR 90. The Flight Safety Operations Manual is not as rigid as Mr. Wiens believes, for it recognizes it cannot cover all situations, and even covered ones may, at times, be handled better in other ways[5].

> The flight crew must be aware that checklists and procedures cannot be created for all conceivable situations and are not intended to preclude the use of good judgment. In some cases the Captain may be required to exercise his/her emergency authority to deviate from the checklists and operating procedures contained herein.
>
> CX 48.

Safety is always the pilot in command's business under FARs 1.1 (definition of pilot in command) and 121.533(d). In the best of all possible worlds, maintenance personnel would overlook no deficiency and correct immediately any found. But when they overlook one, and the Captain or First Officer see it, it ought to be entered in the aircraft maintenance log. The view reflected in Mr. Wiens' testimony, that the duties of pilots and maintenance are prescribed and limited in Horizon's manuals, and ought to be respected, is at odds with the FAA regulations, the text of the Flight Safety Operations Manual and the AIR 21 Act. It assumes maintenance personnel will carry out assigned inspections unfailingly, a dubious assumption for a system as complex as a commercial aircraft. Maintenance may have initial responsibility for placards, but it does not have sole authority to deal with them. All components of air carriers share responsibility to see that aircraft in service meet all FAA standards. Management may not take actions to dissuade pilots from noting (and thereby reporting internally) deficiencies in equipment the FAA requires on passenger aircraft. This is a central tenet of the employee protection provisions Congress enacted in AIR 21.

On August 19, 1999, Captain Brune, Horizon's Chief Pilot Lamar Haugaard, Jerry Hevern (Manager of Dash-8 Flight Standards), and Gary Smith (Representative of the International Brotherhood of Teamsters) met in Portland, Oregon to discuss the exterior placards

[5] The Flight Safety Operations Manual is hardly unique in authorizing experienced professionals to exercise judgment and adjust general rules in unusual situations. For example, the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges at Part 18 of Title 29, Code of Federal Regulations ordinarily govern cases pending here. The rules themselves permit a presiding judge to modify or waive any rule when doing so serves the ends of justice. 29 C.F.R. §18.1(b) (2003).

write up. Following that meeting, Chief Pilot Haugaard wrote in a letter to Captain Brune dated August 27, 1999:

> It is not a pilot requirement to look for, or check, any external placards on the aircraft. I was specific in my instructions to you that you are not to make your own procedures that include external placards in your pre-flight inspections.
>
> * * * *
>
> "[A] continued lack of acceptable performance in these areas will result in discipline up to, and including, termination."

CX 17, RX 6.

The Chief Pilot did not "see that letter as a form of discipline" because "no punitive action was taken." RX 11. Chief Pilot Haugaard also testified at trial that Horizon voluntarily had withdrawn the letter, and so would not use it in any disciplinary proceedings. TR at 94, 263.

Horizon maintained that pilots who happen to see placard discrepancies during preflight inspections may enter them in the aircraft maintenance logs, but they may not inspect placards. TR 89-90. This policy applies to all Horizon pilots, not just Captain Brune. TR 258-260; CX 17. Certainly members of the flight crew are not affirmatively required to check every item of equipment, for to do so they would need to examine aircraft parts inaccessible in a walk-around inspection. The instruction Chief Pilot Haugaard wrote to Captain Brune conflicts with the duty of pilots to record deficiencies in aircraft safety equipment, and is more consistent with Mr. Wiens' flawed understanding of a pilot's role. Saying it is "valid" for pilots to write up missing placards they notice, but "improper" to check that placards are present and legible, because pilots who do so are making up their own procedures, is bureaucratic doubletalk. TR 88-90.

Thereafter, Captain Brune was required to defend himself to the Chief Pilot on August 22, 2000 about several matters. TR 65.

On August 4, 2000, Captain Brune flew Horizon Flight 2018, from Portland, Oregon to Vancouver, British Columbia with First Officer Michael Callahan, who also testified at trial. TR at 198-202. An item on the standard before-takeoff checklist verifies the functioning of the takeoff warning system. The procedure uses a "fail passive" test, *viz.*, if the test button is pushed and no horn sounds, the plane has been correctly configured for takeoff. TR 40. The warning horn failed to sound[6], but Captain Brune was uncertain whether the aircraft had been properly configured when he pushed the button. RX 1 at ¶2, TR 199. If the parking brake was set, or if the condition levers had not yet been placed at maximum, the horn should have sounded. TR 61, 213, 243. Logically, the horn's failure to sound does not tell a pilot that the horn is operating properly. TR 103-104. No procedure in the "Emergency abnormal" section of the Dash-8 Flight Operations Manual addresses a failure of the takeoff warning horn, nor had Captain Brune been trained in how to diagnose a malfunction in it. TR at 108-09, 240.

[6] Asst. Chief Pilot McKinsey erroneously thought the horn functioned properly when he did his pre-meeting investigation for the Chief Pilot. TR 142.

The flight could not proceed without a properly functioning warning horn. FAA regulations are specific about the takeoff warning system commuter aircraft such as the Dash 8 must have:

> (a) The system must provide to the pilots an aural warning that is automatically activated during the initial portion of the takeoff roll if the airplane is in a configuration that would not allow a safe takeoff. The warning must continue until--
>
> (1) The configuration is changed to allow safe takeoff, or
>
> (2) Action is taken by the pilot to abandon the takeoff roll.
>
> (b) The means used to activate the system must function properly for all authorized takeoff power settings and procedures and throughout the ranges of takeoff weights, altitudes, and temperatures for which certification is requested.
>
> FAR 23.703(a)

Clues that a safety system has malfunctioned ought to be investigated. TR 40-42. Captain Brune took one of the components (the electronic field control unit or ECU) out of its takeoff setting, and again pushed the button. The horn should have sounded[7], but did not. He took this as confirmation that the warning horn was not functioning reliably, and First Officer Callahan agreed. TR 199-200. Captain Brune noted the malfunction in the airplane's maintenance log book, and delayed the flight to have maintenance look at it. Nothing he did to check the horn was dangerous. TR 202. According to an internal memo, Captain Brune's actions resulted in a cancellation of two revenue legs for Horizon, although Flight 2018 only was delayed, not cancelled. TR 210; CX 57. Maintenance found the horn functioned properly, but the problem Captain Brune and First Officer Callahan encountered could have been remedied when they re-set the breaker switch at the instruction of maintenance personnel. TR 104-105, 213; CX 44.

Horizon's policy documents instruct employees to adopt a conservative approach when determining whether safety equipment functions properly, in this language:

> All of Horizon flight operations activities will be conducted in compliance with federal aviation regulations and the company policies and procedures stated in this manual. However, NO

[7] The prescribed configuration mimics the aircraft with correct take-off settings. TR 117. By trying to force the horn to sound, Horizon maintains Captain Brune impermissibly created his own procedure. TR 59. I cannot understand that position. After a standard test yields uncertain results, taking further action to verify whether a system created to ensure safe takeoff was operating correctly is not a "procedure" as I understand the word. It was an individual response to an unusual situation, for which the manuals gave no guidance. TR 108. There is no evidence that Captain Brune encountered the problem on any other occasion, and took the action Horizon criticized as a standardized response to it.

> REGULATION OR POLICY IS A SUBSTITUTE FOR THE EXERCISE OF GOOD JUDGMENT. (emphasis in original)
>
> * * * *
>
> All employees of Horizon Air are encouraged to report hazardous conditions, or safety concerns. No disciplinary or punitive action by the company will be taken against an employee who reports such safety information.
>
> * * * *
>
> The determination that a discrepancy requiring an entry in the maintenance log actually exists is a matter of judgment and careful evaluation.…. If the proper operation or airworthiness of any component or system is in question, it must be recorded in the maintenance log and corrective action taken prior to continuing operations.
>
> Horizon Air management supports a conservative approach towards dealing with mechanical discrepancies. If in doubt, do not hesitate to record a discrepancy.
>
> CX 45

Some time after the August 4, 2000 incident, but before August 22, 2000,[8] Captain Brune learned that maintenance had loaded a 400 pound ground power unit ("GPU") by forklift into the cargo hold of a Dash-8 aircraft that he was about to fly, but not tied it down. A GPU has a protruding trailer hitch and sharp metal corners. He requested the maintenance crew to secure it because turbulence was expected during the flight, and a loose unit could shift and cause severe structural damage to the aircraft. When no tie down straps could be found, Captain Brune asked that it be removed, which did not please the ground crew or the station manager who needed the GPU at the flight's destination. Chief Pilot Haugaard acknowledged at trial that an unsecured GPU in the cargo hold of a turbulent plane had the potential to jeopardize the safety of the aircraft, and that he would have made the same decision to remove the GPU that Captain Brune made. TR at 63-66.

To prepare Chief Pilot Haugaard for the August 22, 2000 meeting, Horizon's Assistant Chief Pilot T.W. "Spike" McKinsey sent him an e-mail titled "The Rest of the Story" on August 9, 2000 .[9] He reported his findings after investigating the incidents to be raised with Captain Brune. CX 57. The Assistant Chief Pilot said he made his inquiries "[w]ithout discussing the issue with Captain Brune (for reasons that will be obvious when [Chief Pilot Haugaard] read[s] this)." *Id.* He thought Captain Brune had used "poor judgment" in executing his test of the takeoff warning system, declaring it malfunctioning, and entering it in the maintenance log book.

[8] Captain Brune documented and described the incidents involved in this case with precision, but he was not as precise about dates. I infer when certain events, such as this one, took place. It appears to have been on August 14, 2000 based on a memo from Asst. Chief Pilot McKinsey included in CX 57.

[9] The memo was copied to Jerry Hebrion (then Manager of Flight Standards for the Dash-8), Ken Henninger (Director of Operations), and Dan Scott (Vice President of Operations). Mr. Scott is an executive two levels below the CEO of Horizon. TR at 82.

CX 57. He recommended a Flight Operations Review Board (FORB) be convened to review Captain Brune's "judgment, decision-making, and adherence to standards" "[w]ithout forewarning him or letting him know that a thorough investigation has already determined most facts." *Id.* Assistant Chief Pilot McKinsey concluded the memo with the recommendation that "[i]f [Captain Brune] lies through his teeth [about these incidents], I'd think it appropriate to hammer him." *Id*[10].

On August 22, 2000, Captain Brune met with Chief Pilot Haugaard, Assistant Chief Pilot McKinsey and Craig Duncan, a Horizon Captain and Representative of the International Brotherhood of Teamsters, to discuss the events described above, especially his handling of takeoff warning system on August 4, 2000. Captain Brune was told at the meeting that he improperly deviated from the standardized procedures outlined in the Flight Standards Manual when he tested the integrity of the takeoff warning system.

Chief Pilot Haugaard sent a follow-up letter to Captain Brune about the August 4, 2000 incident, part of which says:

> Frank, I do appreciate the manner in which you approach your job. You are a careful and consummate professional. It is to that professionalism that I implore you to follow the procedures in all situations. When ad hoc procedures are introduced, they can lead to confusion within the flight crew dynamics, and do not in themselves provide an accurate or legal check of any system.
>
> Failure to adhere to our company's approved procedures, and continued use of procedures on the Dash 8 that are not approved by the manufacturer, FAA, or Horizon Air could lead to discipline up to and including termination.
>
> CX 49 dated September 8, 2000.

Threatening discipline for investigating the warning horn was inconsistent with Horizon's own policies and impermissibly interfered with the authority of the pilot in command under FAA regulations. FAR 23.703(a) requires proper functioning of the warning system at takeoff. There had been good reason to delay the flight to investigate whether the horn operated properly, to write the problem up in the aircraft's maintenance log, and to have the maintenance department look into it.

Once the blocks placed around the wheels of a stationary aircraft are removed, control of it passes from the station to the pilot in command; from that time Horizon treats it as if it is in flight. No further maintenance will be done without an entry in the maintenance log by the pilot. TR 119-121; *cf*., CX 47. Maintenance approached Captain Brune after block-out on May 6, 2001, with a placard they wanted to replace inside a Dash-8 he was commanding. He hesitated to make the necessary maintenance log entry, fearing he would subject himself to discipline under the Chief Pilot's August 27, 1999 memo if he did – a reasonable fear in view of the

[10] Chief Pilot Haugaard testified that this memo was in Captain Brune's personnel file at the time that Captain Brune reviewed it in 2000, but that it had been removed later. TR at 85.

memo's threat. He contacted the Duty Officer for the day, Assistant Chief Pilot McKinsey, who directed him to log the deficiency. TR 95, 119, 122, 127. Ironically the earlier threat delayed the flight, while the Duty Officer was consulted.

Assistant Chief Pilot McKinsey's confirming a memo gratuitously accused Captain Brune of making frivolous and illogical maintenance requests in the past. It includes the statement: "[A]ll previous counseling and guidance provided to you still remains in effect. In this case, however, clearly the proper course of action was to get the placard written-up and repaired as soon as possible." CX 24. As it was not written by Chief Pilot Haugaard, who is responsible for pilot discipline, Horizon maintains the memo was neither disciplinary, nor an adverse employment action. The Chief Pilot agreed at trial that the memo's language renewed the instruction that Captain Brune was not to write up failed placards as part of preflight inspections. TR 95.

Captain Brune filed an HA-148 irregularity report after witnessing a weather station manager in Redmond, Washington provide a false weather report to a pilot landing there. TR 72, 152. This incident arose at the same time Captain Brune decided to de-ice his plane in Redmond during snow. The Redmond Station Manager, Jim Cook, claimed it was not snowing and that Captain Brune delayed the flight unnecessarily. When Assistant Chief Pilot Todd Henion investigated, he concluded that it did snow in Redmond and that Captain Brune's decision to de-ice the plane was proper. TR at 74, 151; CX 57, RX 9. The title Assistant Chief Pilot Henion gave to his memo, "Brune - More of the Story", shows the ongoing nature of management's review of Captain Brune's actions. Chief Pilot Haugaard acknowledged that he received a briefing from Assistant Chief Pilot Henion corrobrating Captain Brune's version of the facts. TR 151.

On December 20, 2001, the Occupational Safety and Health Administration ("OSHA") issued its Findings and Preliminary Order in Captain Brune's favor. Its findings of fact generally mirror the findings above. It concluded that there had been a violation of the Act and called for Horizon to take various actions to abate the violations.[11]

IV. Conclusions of Law

This is a trial *de novo* rather than an appeal from OSHA's findings. AIR 21 is relatively new, with little decisional law applying it.

The employee protection provisions in the Act are rooted in bills introduced as the Aviation Safety Protection Act of 1997 in the House of Representatives as H.R. 915, 105th Cong., 1st Sess. by Reps. Sherwood Boehlert and James Clyburn, and introduced in the Senate by Senator John F. Kerry as S. 100, 105th Cong., 1st Sess. The House recognized that "private sector employees who make disclosures concerning health and safety matters pertaining to the

[11] The Preliminary Order called for Horizon to post a Notice to Employees acknowledging its error; to comply with all terms and provisions in the Notice and in the Act; to make Captain Brune whole by removing and destroying the letter of reprimand dated September 8, 2000; to comply with the PRIA, 49 U.S.C.A. § 44703(h); and not to retaliate or discriminate against Captain Brune.

workplace are protected against retaliatory action by over a dozen federal laws," but that "there are no laws specifically designed to protect airline employee whistleblowers." HOUSE COMMITTEE REPORT NO. 639, 105th Cong., 2nd Sess. 51, July 20, 1998. After Senator Kerry's bill was merged into S. 2279, a Senate committee report found the whistleblower provisions "would provide employees of airlines, and employees of airline contractors and subcontractors, with statutory whistleblower protection. . . The language in this section is similar to whistleblower protection laws that cover employees in other industries, such as nuclear energy" (S. REP. NO. 278, 105th Cong., 2d Sess. 4, 22, July 30, 1998).

Neither bill survived conference committee. Language from S. 2279 went on to become S. 648, 106th Cong., 1st Sess., the Aviation Safety Protection Act. Senator Kerry explained the rationale for the bill in this way when he introduced it for himself and Senator Grassley on March 17, 1999:

> The Occupational Safety and Health Act (OSHA) properly protects both private and federal government employees who report health and safety violations from reprisal by their employers. However, because of a loophole, aviation employees are not covered by these protections. Flight attendants and other airline employees are in the best position to recognize breaches in safety regulations and can be the critical link in ensuring safer air travel. Currently, those employees who work for unscrupulous airlines face the possibility of harassment, negative disciplinary action, and even termination if they report violations. Aviation employees perform an important public service when they choose to report safety concerns. No employee should be put in the position of having to choose between his or her job and reporting violations that threaten the safety of passengers and crew. For that reason, we need a strong whistleblower law to protect aviation employees from retaliation by their employers when reporting incidents to federal authorities. Americans who travel on commercial airlines deserve the safeguards that exist when flight attendants and other airline employees can step forward to help federal authorities enforce safety laws.
>
> 145 CONG. REC., S2855 (March 17, 1999)

Reps. Boehlert and Clyburn continued their efforts in the House, introducing H.R. 953 in the 106th Congress, which when amended became H.R. 1000, the "Wendell H. Ford Aviation Investment and Reform Act for the 21st Century." (AIR 21) (H.R. CONF. REP. NO. 106-513, 106th Cong., 2d Sess., March 8, 2000). Senate bills S. 648 and S. 1139 were incorporated into S. 82 on March 8, 2000. (S. REP. NO. 9, 106th Cong., 1st Sess.). Based upon compromise in conference, AIR 21 emerged from these bills and became law on April 5, 2000 as Public Law 106-181, codified as 49 U.S.C.A. § 42121 (2003). *See,* 2000 U.S. Code Cong. and Admin. News p. 80.

The employee protection provisions of AIR 21 remained similar to those enacted in the Energy Reorganization Act of 1974, as amended in 1992, 42 U.S.C.A. § 5851 (ERA), and the

Clean Air Act, 42 U.S.C.A. § 7622 (2003) (CAA). Like them, AIR 21 confers broad authority on the Secretary of Labor to order abatement of any violations.

The employee protection portion of AIR 21, 49 U.S.C.A. § 42121 (2003), reads:

> (a) No air carrier. . . may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)
>
> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.

The Administrative Review Board ("Board" or "ARB") views protected activities expansively. *Tyndall v. U.S. Envtl Prot. Agency*, 1993-CAA-6 and 1995-CAA-5 (ARB June 14, 1996) citing *Jenkins v. U.S. Envtl Prot. Agency*, 1992-CAA-6 (Sec'y May 18, 1994). Under the Clean Air Act, for example, the Board held that to qualify for protection an employee need not prove the employer actually violated environmental laws. The employee must show an objectively reasonable basis to believe the employer's conduct violated the law. Captain Brune must show he reported matters objectively related to air safety for his claim to succeed. *See generally Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB April 8, 1997).

The employee has the initial burden to prove that: (1) he engaged in a protected activity; (2) he was subjected to an adverse employment action; and (3) evidence raises a reasonable inference that the protected activity likely contributed to the employer's decision to take the adverse action. 49 U.S.C.A. §42121(b)(2)(B)(i) and (iii) (2003); 29 C.F.R. § 1979.104(a), (b)(1-2) (2003); *see also Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999).

The employer then must demonstrate by clear and convincing evidence that it would have taken the unfavorable personnel action in the absence of the employee's protected activity. *Trimmer*, 174 F.3d at 1102. "Clear and convincing" evidence is more than a preponderance of

the evidence but less than proof "beyond a reasonable doubt." *See Yule v. Burns Int'l Sec. Serv.*, 1993-ERA-12 (Sec'y May 24, 1995).

When the employer produces a legitimate, nondiscriminatory reason for its employment decision, the employee must prove by a preponderance of the evidence that the proffered reasons are "incredible and constitute a pretext for discrimination." *Overall v. Tenn. Valley Auth.*, 1997-ERA-53 at 13 (ARB Apr. 30, 2001).

A. Timeliness

An employee must file a claim "[w]ithin 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant)." 29 C.F.R. § 1979.103(d) (2003). The period begins to run when the employer takes the adverse action, not when the employee engaged in the protected activity. *Erickson v. U.S. Envtl. Prot. Agency*, 1999-CAA-2 (ARB July 31, 2001)(citing 29 C.F.R. § 24.3).

Horizon argues that Captain Brune did not file his complaint within 90 days of the alleged instances of discrimination, as the Act requires. Captain Brune responds in two ways: first, that the history of adverse employment actions taken against him shows a pattern of discrimination creating a hostile work environment; and second, those stale allegations could be considered under a "continuing violation" theory, because there has been a course of discriminatory conduct related to a charge he timely filed. The question becomes whether Horizon took adverse employment actions, and whether Captain Brune filed a complaint within 90 days of one of them. Whether there was an adverse employment action is examined in Section IV. B. 2 of this decision.

1. *Acts of Discrimination since the Act Took Effect*

The original complaint Captain Brune filed with the Seattle Regional Office of OSHA on May 22, 2001 included allegations about discrimination before and after the Act became law.

> Complainant claims that he has received disciplinary letters (including a letter dated 5/7/01) threatening him with discharge because he refused to accept an assignment because it was in violation of [FAR] 121.147(b)(1), "Hours of Rest." Since then, complainant claims he has been harassed including being instructed not to write up certain mechanical problems. Complainant alleges the disciplinary letters and harassment are in violation of [the Act].
>
> Complaint, May 22, 2001.

Horizon adversely affected Captain Brune's "compensation, terms, conditions, or privileges of employment" from 1999 until 2001, by docking his pay, by writing letters threatening discipline up to and including termination, and requiring him to repeatedly justify correct actions he took. The May 7, 2001 interoffice memo from Assistant Chief Pilot McKinsey telling him that "all previous counseling and guidance provided to you still remains in effect" makes Captain Brune's claims timely. It once again warned Captain Brune he was subject to discipline if he failed to heed the Chief Pilot's earlier written instructions. The FAA

regulations expect a pilot in command to exercise broader discretion in reporting equipment problems or dealing with potential malfunctions than management's instructions to him allowed. Captain Brune's complaint mentioned the May 7, 2001 memo, so his complaint falls within the 90-day time window allotted by the Act.

2. *"Continuing Violation"*

The complaint also is timely under a continuing violation theory. Evidence that ordinarily would be time barred may be considered as long as the stale incidents represent ongoing unlawful employment practices under a three-part test developed by the Secretary of Labor.[12]

The Supreme Court recently discussed the continuing violation theory in *National R.R. Passenger Corp. v. Morgan*, 122 S.Ct. 2061, 536 U. S. 101 (2002) (*Morgan*), involving a Title VII claim of invidious racial discrimination. It affirmed in part and reversed in part a court of appeals decision which had allowed untimely claims so long as they were either "sufficiently related" to incidents that fell within the statutory period or were a part of a systematic policy or practice of discrimination that took place, at least in part, within the limitations period. *Id.* at 2068. The Supreme Court held that a continuing violation could be supported under the "hostile work environment" theory, but not under the "serial violations" theory. *Id.* at 2077.

With regard to a "hostile work environment" claim, the Court said:

> A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." [citation omitted]. . . It does not matter . . . that some of the component acts of the hostile work environment fall outside of the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by the court for the purposes of determining liability.

Morgan, 122 S.Ct. at 2074.[13]

Section IV. B. 2. below shows the hostility that led to repeated adverse employment actions against Captain Brune from 1999 until 2001. The unlawful practice was management's

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[12] Articulated in cases such as *Berry v. Board of Supervisors of LSU,* 715 F.2d 971 (5th Cir. 1983), *Webb v. Carolina Power & Light Co.,* 93-ERA-42 (ARB Aug. 26 1997), and *Thomas v. Ariz. Pub. Serv. Co.,* 88-ERA-212 (Sec'y Sept. 25, 1993), the test identifies three factors bearing on whether there has been a continuing violation: (1) whether the subject matter of the discrimination was the same; (2) whether the acts recurred on a frequent basis; and (3) whether the acts had a degree of permanence which would trigger an employee's awareness of, and duty to assert her rights. *Berry,* 715 F.2d at 981.

[13] The period in which employees can bring hostile work environment claims against employers is still subject to waiver, estoppel, and tolling "when equity so requires." *Morgan*, 122 S.Ct. at 2077 (citing *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 398 (1982). It is by no means clear how this applies in an agency adjudication, for Secretaries of executive departments (and administrative law judges acting on their behalf) lack the equity powers of U.S. District Judges.

ongoing attempt to constrain Captain Brune's discretion in ways inconsistent with federal law, by threats and by singling him out, and requiring justificaton for his actions as a pilot in command. Not all these acts occurred within the 90 days before Captain Brune complained to the Department of Labor, but as they unfolded the actions collectively created a hostile work environment. They were meant to have continuing effect, for in every preflight inspection Captain Brune faced the threat of discipline if he wrote up as deficiencies things not listed in the preflight checklist. Although he was under a threat of discipline, no major event brought matters to a head, such as a termination, suspension, or loss of pay after the Act became effective. Management's actions should be viewed as one unlawful employment practice. Seen in this way, under the Secretary's decisions Captain Brune's claims also are timely under the hostile work environment theory.[14]

B. Captain Brune's Prima Facie Case

1. *Protected Activity*

Reporting something the complainant reasonably believes has violated an underlying substantive act (whether dealing with nuclear safety, environmental protection, etc.) is a "protected activity." *Davis v. United Airlines, Inc.,* 2001-AIR-5, at 10 (ALJ July 25, 2002).

Federal law confers great responsibility on a pilot in command, and commensurate authority. "The pilot is command of an aircraft is directly responsible for, and is the final authority as to the operation of that aircraft." FAR 91.3. The pilot has a non-delegable duty to ensure an aircraft is airworthy, for FAR 91.7 says:

> **Civil aircraft airworthiness**. (a) No person may operate a civil aircraft unless it is in an airworthy condition.
>
> (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

Internal safety and quality control complaints are protected activities under statutes such as the Clean Air Act, the Toxic Substances Control Act and the Energy Reorganization Act.[15] *See Mackowiak v. Univ. Nuclear Systems, Inc.,* 735 F.2d 1159, 1163 (9th Cir. 1984); *Bassett v. Niagara Mohawk Power Corp.,* 1985-ERA-34 (Sec'y Sept. 28, 1993); *Post v. Hensel Phelps Construction Co.,* 94-CAA- 13 (Sec'y Aug. 9, 1995); *Davis,* 2001-AIR-5, at 28. Proof that a safety standard actually has been violated is not necessary, but the report must be "grounded in

[14] This conclusion is consistent with the position expressed at page 5 of the OSHA Regional Administrator's preliminary order of December 20, 2001, that treated the September 8, 2000 letter of reprimand as discrimination that could be remedied under the "continuing violation" theory.

[15] Unlike the other circuit courts (including the Ninth Circuit, where this matter arose) and the ARB, the Fifth Circuit does not regard internal complaints as protected activities under the ERA. *See Brown & Root, Inc. v. Donovan,* 747 F.2d 1029 (5th Cir. 1984); *Macktal v. U.S. Dep't of Labor,* 171 F.3d 323 (5th Cir. 1999). No such issue arises here, for Air 21 specifically protects "information relating to any violation" that is "provided to the employer." 49 U.S.C.A. § 42121(a)(1) (2003).

conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.,* 92-SWD-1 (Sec'y Jan. 25, 1995), at 8. This awkward phrase means that a complainant's subjective belief that something was amiss is not enough, there must be an objectively reasonable basis to think that the employer may have violated a relevant federal law (a statute, regulation, order or other legally enforceable standard of conduct).

Mackowiak is instructive, for it dealt with an analogous question – whether an employee who filed internal safety complaints in another industry subject to pervasive federal regulation had engaged in protected activities. The employer was in the nuclear energy industry, regulated by the Nuclear Regulatory Commission ("NRC"). The Ninth Circuit held that Section 5851 of the ERA protects quality control inspectors from retaliation for submitting internal reports about safety or quality problems because those inspectors "play a crucial role in the NRC's regulatory scheme." *Mackowiak,* 735 F.2d at 1163. The court realized that:

> At times, the inspector may come into conflict with the employer by identifying problems that might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.

Raising specific concerns about safety issues is a protected activity. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). Captain Brune did that at Horizon before and after the Act became effective. First he filed two Flight Operations Irregularity Reports (HA-148) declining to pilot flights without sufficient rest, because doing so would violate FAR 121.471(d). CX 33. Second, he reported failed placards on Horizon aircraft on at least two occasions (July 30, 1999 and May 6, 2001), both of which were grounded in reasonable safety concerns, for they related to required equipment on the aircraft. The reports were entered in the aircraft maintenance log both times, which is a form of internal reporting. Captain Brune ultimately reported the incidents to the FAA and to OSHA, but the internal report is the primary basis for his claim. Third, Captain Brune reported the problem he encountered with the takeoff warning system on August 4, 2000 by entering it in the maintenance log. And once again, Captain Brune reported this incident to the FAA and to OSHA. Fourth, around August 14, 2000, Captain Brune reported irregularities with securing the GPU in the cargo area, and later filed an irregularity report after witnessing a station manager in Redmond, Washington make a false report about hazardous weather to a crew in flight. Misrepresenting weather conditions to a crew in flight violates FAR 121.101. TR at 72. Management required him to justify each of these actions. Sometimes he was exonerated, but other times he was threatened for the reports he had made. Requiring these justifications was a pattern of harassment carried out in retribution for his reporting.

Captain Brune made his reports under Horizon's internal guidelines and FAR 121.563, which states:

> The pilot in command shall ensure that all mechanical irregularities occurring during flight time are entered in the maintenance log of the airplane at the end of that flight time. Before each flight the pilot in command shall ascertain the status of each irregularity entered in the log at the end of the preceding flight.

FAR 121.563.

All the reports objectively related to safety of passengers and aircraft. They were protected activities after AIR 21 Act became effective. This would be true even if Captain Brune's allegations were ultimately unsubstantiated. *Minard*, 92-SWD-1, at 8. His inspection and reporting duties placed him in a position similar to that of the safety and quality control inspector in *Mackowiak* when he made reports to Horizon.

Regulations obliging pilots to record or report irregularities engender conflicts with managers trying to ensure on time performance, and maximize the number of revenue legs flown; management goals suffer when recorded deficiencies have to be corrected. *See generally,* John J. Nance & Charles David Thompson, *The Pilot Records Improvement Act of 1996: Unintended Consequences*, 66 J. Air L. & Com. 1225 (2001). Traditionally, a pilot facing the dilemma of reporting irregularities or antagonizing management could resign or accept termination rather than comply with pressure to overlook dangerous conditions. Before 1996, a pilot who resigned or was terminated in these circumstances could apply to another air carrier and give his explanation for the previous job separation or loss. *See* Nance & Thompson, *supra*, at 1226-28. The Pilot Record Improvement Act of 1996 (PRIA) complicates the pilot's situation, for PRIA requires air carriers to report the records of former employees to prospective airline employers. 49 U.S.C.A. § 44703(h)(1) (2003). An unfavorable entry in the employment record, especially one that an air carrier terminated the pilot for "unsatisfactory performance," becomes permanent and public, with little meaningful opportunity for explanation, and potentially ruinous consequences for honest and competent pilots. *Id*.; Nance &Thompson, *supra* at 1236.

The statutes and regulations governing air commerce assign safety the highest priority. *See* 49 U.S.C.A. § 40101(a)(1) and (3), (d)(1) (2003). PRIA minimizes the possibility that a pilot with dangerously flawed judgment may obtain employment with an airline that does not know about earlier instances of incompetence, by making pilots' personnel files available to later potential employers. AIR 21 serves as a sort of counterbalance. It promotes safe air commerce by protecting pilots (and other airline employees) from implicitly or overtly coercive memoranda placed in their personnel files to discourage reports about deficiencies in operations or equipment. Both PRIA and AIR 21 reflect the central position pilots occupy in implementing the Congressional policy of making air travel as safe as possible.

As pilot in command, Captain Brune had "final authority and responsibility for the operation and safety of the flight." FAR 1.1, *see also* FAR 91.3, *supra*. He bore ultimate responsibility for operational control of the aircraft (along with the aircraft dispatcher); and for the safety of the passengers, crew, cargo, and aircraft. FAR 121.533(b), (e). This responsibility explicitly requires the pilot in command to ensure compliance with regulations and operations specifications, *see* FARs 121.535(b), 121.537(b).

Assistant Chief Pilot McKinsey understood that Captain Brune's concern for safety and quality conflicted with Horizon's goals, because it caused the carrier expense and delay. He directed Captain Brune to write the failed placard up in the maintenance log "from a need to resolve the impasse between [Captain Brune] and maintenance, and get the flight running". This

situation embodies the concerns that led Congress to extend whistleblower protection to air carrier employees, to protect them from retribution for engaging in protected activity. FAA regulations require the pilot in command to ensure rather than assume that all is well with the aircraft, and thereby protect the safety of the passengers, crew and aircraft. No other officer or employee of an airline may interfere with that non-delegable duty. The Chief Pilot's memo of August 27, 1999 forbidding Captain Brune from writing up placard deficiencies set up the problem Assistant Chief Pilot McKinsey had to handle. Had Horizon management allowed pilots to exercise the duties and authority assigned to them by the FAA, neither the Chief Pilot's letter of August 27, 1999 nor Assistant Chief Pilot McKinsey's memo of May 7, 2001 would have been written.

Captain Brune has satisfied the initial burden of proving that he engaged in protected activity.

2. *Horizon's Adverse Employment Actions*

A complainant must show that something the employer did adversely affected his employment. See *Trimmer*, 174 F.3d at 1103. The Secretary's regulations forbid air carriers "to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee" who has engaged in protected activity. *See* 29 C.F.R. § 1979.102(b) (2003). *See also,* 29 C.F.R. § 24.2(b) (2003) (adopting similar definitions under similar whistleblower protection statutes). AIR 21 protections are not reserved for especially detrimental employment actions, such as termination, suspension, demotion, or loss of status or pay.

Horizon took these adverse actions against Captain Brune from 1999 to 2001:

1) reducing Captain Brune's pay in July and September 1999 for refusing to pilot two flights without prescribed rest, in violation of flight regulations;
2) sending the intimidating memo to Captain Brune on August 27, 1999, threatening termination if he failed to adhere to company procedures by continuing to write up placard deficiencies;
3) launching an investigation into and requiring Captain Brune to defend several correct decisions he made, including:
    (i) writing up the takeoff warning system on Flight 2018 on August 4, 2000,
    (ii) requiring the removal of the improperly secured GPU from a flight,
    (iii) filing the irregularity report after he heard a station manager give false weather advice to an incoming flight crew, (RX 9)
    (iv) de-iceing an aircraft when it snowed in Redmond, WA, over the station manager's objection that it delayed the flight (RX 9);
4) preparing to "hammer" Captain Brune at the August 22, 2000 meeting;
5) sending a second intimidating memo on September 8, 2000 from the Chief Pilot (CX 49), after he defended himself at the August 22, 2000 meeting, again threatening termination if Captain Brune failed to adhere to company guidelines;
6) sending the May 7, 2001 interoffice memo from Assistant Chief Pilot McKinsey that reiterated the earlier written threats of August 27, 1999 and September 8, 2000 (CX 24).

Beginning in mid-1999 and continuing at least through mid-2001, Horizon management repeatedly threatened, harassed and tried to intimidate Captain Brune to dissuade him from carrying out all his duties as pilot in command. The statement "failure to adhere to our company's approved procedures . . . could lead to discipline up to and including termination" is a potent threat to a person who is the family breadwinner and health care insurance provider, as management meant it to be. TR at 67-68, CX 49.

The May 7, 2001 memo by itself is a sufficient adverse employment action to establish a timely AIR 21 claim. In conjunction with the incidents mentioned above, the facts show a hostile work environment which constitutes one unlawful employment practice. Captain Brune has satisfied the burden of showing one or more adverse employment actions against him.

3. *Protected Activity as a Contributing Factor in Adverse Employment Action*

The final predicate of a prima facie case is to determine whether Captain Brune's protected activity was a "contributing factor" in Horizon's "unfavorable personnel action[s]". 49 U.S.C.A. § 42121(b)(2)(B)(i), (iii) (2003). The decision in *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), considered that term's meaning in the Whistleblower Protection Act for federal employees, 5 U.S.C.A. § 1221(e)(1) (2003). That court wrote:

> The words "a contributing factor" means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted). The term should be interpreted similarly under AIR 21.

Captain Brune can demonstrate the nexus required in several ways: (1) by showing that the protected activity and the adverse employment action are temporally proximate; (2) by showing that the employer deviated from established disciplinary procedures when disciplining the complainant; or (3) by showing that the complainant received disparate discipline from similar employees.

Temporal proximity is enough to raise an inference of causation in a whistleblower matter. *Jackson v. Ketchikan Pulp. Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan. 5, 1993); *Tracanna v. Arctic Slope Inspection Serv.*, 1997-WPC-1 (ARB July 31, 2001). Temporal proximity sufficient to raise the inference has ranged from two days, *Lederhaus v. Donald Paschen & Midwest Inspection Serv., Ltd.*, 1991-ERA-13 (Sec'y Oct. 26, 1992), to about one year, *Thomas v. Ariz. Pub. Serv. Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993). The causal connection can be severed by a significant length of time or by some legitimate intervening event. *Tracanna*, slip op. at 7-8; *Evans v.*

Wash. Public Power Supply System, 1995-ERA-52 (ARB July 30, 1996) (citing *Williams v. S. Coaches*, *Inc.*, 1994-STA-44 (Sec'y Sept. 11, 1995)).

Most of the adverse actions Horizon took against Captain Brune followed close on the heels of protected activities. The August 27, 1999 letter threatening termination came just a few days after Captain Brune met with his superiors to discuss the exterior placards incident (August 19, 1999), and only a few weeks after the incident itself (July 30, 1999). The preliminary August 9, 2000 investigation into the takeoff warning system incident by Assistant Chief Pilot McKinsey happened five days after the incident itself, the meeting to discuss it happened on August 22, and the Chief Pilot's memo was sent on September 8, 2000. Captain Brune's protected activities met prompt hostile responses from Horizon management. The necessary nexus was present between the activities and the adverse actions.

Captain Brune also demonstrated disparate treatment by his managers. Management sent no memos threatening discipline up to and including termination to other pilots who reported problems they observed on aircraft that were not identified specifically on preflight checklists, even when those reports caused maintenance delays in takeoffs. Management instead took the less aggressive tactic of implying those pilots would be sent to further training or put through burdensome flight proficiency checks. CX 56, TR 161-163. The disparate treatment is most easily seen in the "Rest of the Story" memo Assistant Chief Pilot McKinsey wrote. He suggested that the Chief Pilot call Captain Brune to a Flight Operations Review Board meeting without notice, and "hammer" him "if he lie[d] through his teeth" there. CX 57. Management had no valid basis to fear that Captain Brune was untruthful. The Assistant Chief Pilot's belligerent tone and desire to "hammer" Captain Brune were not typical of how Horizon dealt with its professional pilots, and illustrates management's discriminatory animus toward him. The Chief Pilot convened no Flight Operations Review Board; the August 22, 2000 meeting where Captain Brune was required to justify recent actions was a less formal gathering, but led to the Chief Pilot's intimidating memo of September 8, 2000 (CX 49). Along with the temporal proximity to Horizon's other adverse employment actions, the disparate treatment shows that Horizon singled Captain Brune out for retribution.

Captain Brune has adequately proven a prima facie case under AIR 21. Horizon took adverse actions against Captain Brune in one form or another, usually right after Captain Brune had engaged in some form of protected activity.

C. Respondent's Showing of Non-Discriminatory Motive

Horizon must demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of the protected activities. 49 U.S.C.A. § 42121(b)(2)(B)(iv) (2003). Respondent argues it took the adverse employment actions because Captain Brune deviated from standardized company procedures.

Evidence fails to support this argument. Through the testimony of Don Wiens, the manager in charge of developing procedures in the Flight Standards Manual for the Dash-8 aircraft, Horizon expressed the importance of a pilot following the Flight Standards Manual:

Q: [H]ow important is it for a pilot to follow the procedures [contained in the Flight Standards Manual]?

A: It's very important. These are the procedures by which we put our aircraft into proper configuration for takeoff. Everything is set up for takeoff and departure.

TR at 174-75.

As Mr. Wiens testified at trial, the Flight Standards Manual is a large volume that is constantly evolving. The Manual itself recognizes that crews will confront abnormal situations, and states:

> The flight crew must be aware that checklists and procedures cannot be created for all conceivable situations and are not intended to preclude the use of good judgment. In some cases the Captain may be required to exercise his/her emergency authority to deviate from the checklists and operating procedures contained herein.

CX 48.

Captain Brune could follow every procedure in the Flight Standards Manual to the letter, but rigidly doing so would contradict the Manual. Pilots must also use their professional judgment. Mr. Wiens acknowledged that inspecting the de-ice boots on the tail of an airplane during a preflight, or taxiing an airplane with a single pilot are not described in the Manual, yet are examples of appropriate things pilots do. TR at 189-197.

Horizon's Chief Pilot recognized Captain Brune as "a careful and consummate professional" who took seriously FAA regulations and Horizon procedures. CX 49. Writing up failed placards, and following up on indications that a takeoff warning system may be malfunctioning are things pilots ought to do. They represent matters committed to a pilot's judgment, as long as there is an objectively reasonable basis for what is done. FAA regulations and Horizon policy delegate authority to a pilot to use his professional judgment in abnormal situations; Horizon cannot reprimand him for reasonable exercises of that judgment. Horizon's argument that it took its adverse against Captain Brune because he invented his own procedures is simply untenable.

Horizon also implied that in 1999 when the placard issue first arose, Captain Brune was writing up too many mechanical discrepancies (including placards). Chief Pilot Haugaard testified that in a "short time span" which he did not specify, Captain Brune's maintenance write ups of all kinds increased from about "one or two" "on a typical flight" to "four to six per flight," and remained at that level for "a couple of weeks." TR 259-260. No compilation of aircraft maintenance log entries was offered to support these general recollections of the events in 1999[16]. No evidence was offered that Captain Brune had made any specific maintenance log

[16] In earlier testimony Chief Pilot Haugaard has some difficulty recalling with specificity what had happened at meetings in August 2000. TR 61, 63. I doubt his memory on this topic was better, when he had no documents to assist his recollection.

entry without an objectively reasonable basis for it. The Chief Pilot thought the reason for the up-tick in entries was labor unrest, an inference the evidence offered at trial is insufficient to support.

If Horizon had proven successfully that Captain Brune's motivation for the maintenance entries he made was tainted by a desire to impede its on-time performance while labor negotiations were pending, it is not clear that he would lose AIR 21 protection. To Congress, the FAA and the traveling public, motivation for pointing out a deficiency in an aircraft is irrelevant. The aircraft is airworthy or it is not. If not, it must be repaired. On the other hand, tainted motivation may undercut the employee's evidence about whether there was an objectively reasonable basis to believe the deficiency alleged actually existed. *Cf.*, *Szpyrka v. American Eagle Airlines, Inc.*, 2002-AIR-00002 (Order Denying Cross Motions for Summary Decision dated July 8, 2002) at 5 (suggesting that actions premised upon personal pecuniary interests, employee convenience, or irritation with management may not be protected activities).

The Chief Pilot also asserted his belief that Captain Brune had asked maintenance control in Walla Walla, WA to fax him an entire sheet from the Maintenance Manual showing all external placards on the Dash 8. TR 87. The implication was that Captain Brune meant to use it to be hypercritical in preflight placard inspections. Horizon submitted no proof Captain Brune ever made such a request. No employee from Walla Walla testified Captain Brune asked for that data sheet; no business record was offered to show that Captain Brune had requested it. Captain Brune believed maintenance personnel at Walla Walla asked for the sheet, in order to make correct entries in an aircraft logbook, and effect an interim repair. Horizon's evidence falls far short of clear and convincing proof that it had a non-discriminatory motive for writing the August 27, 1999 memo instructing Captain Brune not to include external placards in preflight inspections, on pain of discipline.

In sum, I find that Horizon failed to show a non-discriminatory motive for treating Captain Brune as it did. I need not address the final component in the burden of proof standards (*viz*., whether Captain Brune demonstrated that Respondent's proffered reasons were a pretext for discrimination). Horizon violated the Act, and Captain Brune is entitled to relief.

E. Relief

Captain Brune seeks various forms of relief – monetary and otherwise – to remedy Horizon's violations.

These are the Secretary's regulations on fashioning a remedy:

> If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

29 C.F.R. § 1979.109(b) (2003).

1. *Abatement of the violation*

Captain Brune has proven that from mid-1999 to the time of trial, he engaged in a number of protected activities, and suffered adverse employment actions by Horizon for doing so. His record at Horizon should be purged of the negative references found in the relevant letters and memos written to and about him. Horizon maintains several personnel folders, for different purposes. *See* CX 54; TR 285. The Chief Pilot's threatening letters dated August 27, 1999 and September 8, 2000, the Assistant Chief Pilot's August 9, 2000 memoranda to the Chief Pilot (the Rest of the Story memo), and the May 7, 2001 memo from Assistant Chief Pilot McKinsey to Captain Brune are to be removed from all of Captain Brune's records and destroyed. This applies to all folders, however denominated by Horizon and in all the places they are kept. These documents are not items which must be retained under the Pilot Records Improvement Act, 49 U.S.C.A. § 44703(h)(1)(B)(ii)(II) (2003), for the Chief Pilot testified that some of them already have been voluntarily removed from some folders.

2. *Compensatory damages*

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation under 29 C.F.R. § 1979.109(b) (2003). Damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the employee. The testimony of medical or psychiatric experts is not strictly necessary. *Thomas v. Arizona Public Service Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993).

Citing a number of whistleblower cases, Captain Brune seeks between $1,000 and $20,000 in compensatory damages for the humiliation, mental anguish, and the hypertension that he suffered as a result of Horizon's adverse employment actions. The facts of those cases were far different. The complainants suffered mental anguish due to termination or demotion, and had actual wage losses, while Captain Brune never was fired or demoted. Other than the days that he was docked pay for not flying, his salary remained the same. His salary had been reinstated by his action in the Washington state courts.

Even if Captain Brune's case were similar to the ones he relies on, he failed to prove his injuries adequately. He made an effort to show that he suffers from hypertension, and to link it to anxiety over work conditions, by submitting a letter dated October 3, 2002 from his treating physician, Steven M. Lisook, D.O. CX 55. Dr. Lisook wrote in his report "[i]t is my opinion that the reported hostile work environment created at Horizon Airlines is a significant, and may be the major contributing factor, to [Captain Brune's] current hypertension state." *Id*. Chronology does not equal causation. There are several factors that "may" have caused Captain Brune's hypertension. In the absence of testimony from a doctor firmly correlating Captain Brune's cardiovascular condition with what he experienced at Horizon, he failed to demonstrate a compensable injury. Dr. Lisook did not testify at trial, and his statement was not subject to cross examination by Horizon. It would be fundamentally unfair for me to rely on the brief,

conclusory opinion of the treating doctor who did not testify, which is why that letter was not admitted as evidence. CX 55 for identification.

Captain Brune asserted that he has suffered mental anguish and humiliation. No evidence corroborates these statements. He also failed to put forward an appropriate measure of damages for the items claimed.

3. *Attorney's fees and costs*

In *Varnadore*, the ALJ considered fee petitions totaling over $700,000. Relying primarily on *Hensley v. Eckerhart*, 461 U.S. 424 (1983) for the applicable principles, the judge wrote:

> To recover costs such as attorney fees, a plaintiff must be a prevailing party. In this context a party may be considered to have prevailed if they succeeded on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit. [citation omitted]. By that standard, Mr. Varnadore is a prevailing party.

Captain Brune has prevailed here. Although he has recovered no compensatory damages, he proved that Horizon violated the Act and that he is entitled to abatement of its violations. Success on this significant issue carries with it his attorney's fees and his costs. 29 C.F.R. § 1979.109(b) (2003). Captain Brune is not entitled to receive attorney's fees for his own trial preparation time or for his time at the trial itself. *Doyle v. Hydro Nuclear Services*, 1989-ERA-22 (ARB May 17, 2000). He may be reimbursed attorney's fees paid or owed to his former lawyer for the work Ms. Stuart did. *Varnadore v. Oak Ridge National Laboratory*, 1992-CAA-2 and 5 and 1993-CAA-1 (ALJ Sept. 22, 1994). He seeks these fees and costs: $36 for copying and mailing, $298 for missing a trip to attend a company-ordered deposition on October 11, 2002, $275 for the trip removed from his schedule on November 12, 2002 to attend the hearing, and attorney's fees in the amount of $3,535 to cover a legal bill from Ms. Diana Stuart, Esquire.

The Act does not explicitly mention as recoverable costs money Captain Brune lost when he missed work to attend trial or a deposition, but case law suggests that he may be entitled to some out of pocket costs. *Creekmore v. ABB Power Systems Energy Services, Inc.,* 1993-ERA-24 (Sec'y Feb. 14, 1996); *Hobby v. Georgia Power Co*., 1990-ERA-30 (ARB Feb. 9, 2001). The employer in *Hobby* was required to pay the employee's attorney fees and costs associated with attending the hearing (*e.g*., costs for transportation, lodging and meals), but was denied costs for attending the deposition of a witness because the ARB and the judge who decided the case regarded him as not "absolutely necessary or even helpful" at the deposition. Captain Brune would be entitled to recover costs associated with attending the hearing and his own deposition (where he assuredly was "necessary and helpful" to the proceeding), but he is not entitled to recover as costs wages for missing work on those days. He may submit documentation of the approved costs along with an attorney fees petition. This result encourages whistleblowers to pursue claims despite the potential sacrifices they may have to make.

V. Order

It is ORDERED that:

1. Horizon shall post immediately in a conspicuous place in or about its facility, including places where notices for employees are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting, the Notice to Employees (signed by the appropriate official) that was attached to the Preliminary Order of December 20, 2001;

2. Horizon shall comply with the employee protection provisions of the Act and with the provisions of the Notice to Employees;

3. Horizon shall make Captain Brune whole; it shall purge from Captain Brune's personnel files all references to engaging in a protected activity and the threats of discipline resulting from doing so, specifically including the memos to him from the Chief Pilot and Assistant Chief Pilot described above in the portion of the decision on relief; those memoranda shall not be used against Captain Brune in the event that he applies for any future employment opportunities; nor disclosed in references provided for Captain Brune to any potential employers;

4. Horizon shall pay all costs and expenses, including attorney's fees, reasonably incurred by Captain Brune in connection with this proceeding. Captain Brune has thirty days to submit an application for attorneys fees, which must be accompanied by a service sheet showing service upon Horizon. The application for fees and costs shall be prepared on a line item basis. It shall clearly state the hourly rate the attorney typically charges and receives from clients who retain her on an hourly basis, and be supported by a declaration establishing those facts. It shall also contain a clear itemization of the types and complexity of services rendered. Horizon shall have 14 days following service of such an application to file any objections, which shall be made on a line item basis. A reply to the objections may be filed within ten days after the objections are served. The parties or their counsel shall meet within ten days thereafter and attempt to resolve all objections. They shall file a joint report within in ten days of their meeting stating the objections resolved and those remaining for decision.

5. Horizon shall not retaliate or discriminate against Captain Brune in any manner for instituting any proceeding under or related to the Act.

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WILLIAM DORSEY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110 (2003) unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found in OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).